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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 699

BEATRICE L. GOLDSTONE and EUGENE L. BONDY, EXECUTORS OF THE ESTATE OF MORRIS L. GOLDSTONE, DECEASED, PETITIONERS,

v.

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

REPLY BRIEF OF PETITIONERS

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This reply will attempt to avoid any repetition of the petitioners' main brief. It will refer to the pages of the brief submitted for the United States to which its comments apply and, where possible, will quote the opening words of the passage to which comment is directed.

p. 2: "*On June 29th, 1933, the decedent purchased etc.*"

The stipulation and findings do not justify this assertion. They go no further than that "the Society entered into two contracts". (R. 3) and that the decedent's check paid the consideration. From the outset the wife was the "Owner" and "Purchaser". The money may therefore be regarded as having been a gift; but the decedent never owned either contract.

p. 7 "In the *Le Gierse case etc.*" The only question there at issue, as we read it, was whether the forty thousand dollar insurance credit then allowed to the gross estate could be claimed where there was no insurance risk. There was no question that the proceeds, except for this, constituted an element of the gross estate, since the decedent who, at the age of 80, bought the contracts within a month of her death, retained indefeasibly the income for her life. It was in 1936 after the 1932 amendment of sec. 302(c) had made this controlling.

ps. 7-8 "*In Fidelity-Philadelphia Trust Company etc.*" The Court considered this case on a writ of certiorari, limited only to the question of the valuation. True, it was taken for granted that the remoteness of the decedent's contingent interest did not affect the application of *Klein* v. *United States*, 283 U. S. 231, and *Helvering* v. *Hallock*, 309 U. S. 106. If she "held the string", even though her reversion would come into effect only after the death of her two daughters and their young children, it was nevertheless a string. Our point is, of course, that here the only string was held by the wife and not by the decedent. Remoteness is not involved.

p. 9 The same applies with respect to *Commissioner* v. *Field*. Here, too, the only point was that of valuation.

p. 9 "*The decedent here retained a string etc.*"

p. 10 "* * * *the decedent nevertheless retained an interest* * * *".

p. 11 "*The decisive consideration is that only at the moment of his death did the husband's reversionary interest come to an end*".

The assertions of the respondent's brief, of which these are samples, all seem to beg the question. They have overlooked the fact that the wife might have completely excluded the decedent, a circumstance not present in any analogous case we have discovered in this Court. Thus, not only might she have surrendered both contracts but

she might have assigned them. If she had assigned the insurance contract, she would have excluded "any and all rights of the Insured (R. 29)". If she had assigned the Annuity contract, her act would "operate to exclude any and all rights of any Beneficiary or Annuitant under this contract (R. 33)". Only if she chose to accept a reassignment in either case would the old terms be reinstated.

Obviously, she was free to assign the Annuity contract at will and realize the price for her own benefit. While her assignment of the insurance contract was restricted by the New York Statute (N. Y. Insurance Law, L. 1939, ch. 882, Section 146) to persons with an insurable interest, she might well have made the assignment to the two daughters or to any others who were within that class; and the consideration might well have been in excess of the surrender value, taking into account the real value based on the decedent's then expectancy of life. In either event, then, even had she died before him, he would take no rights of Owner or Purchaser since, by the above quoted clauses, the assignments would exclude the decedent.

What control then did the decedent retain?

p. 10 "* * * *surrender by the wife during the decedent's lifetime would have been at variance with the essential purpose of the arrangement, which was in the nature of an investment to mature upon the decedent's death*".

This declaration needs support from the record and finds none. If it were in the nature of an investment by the decedent he would necessarily have provided an indestructible income for himself for his life. The decedent in the *Le Gierse* case did just that. Here the decedent "retained" nothing. The day after the contracts were issued to his wife, she might have "excluded" him completely in the manner provided by the very clauses of the contracts. Everything points to an outright gift in 1933. Such cases as *United States* v. *Clifford* (309 U. S. 331) have no application, for there an income was provided for the settlor's family by a short term trust with control in the settlor.

Here, no income was assured since the wife for a variety of reasons might have realized the cash value of the contracts and dissipated them at will. Her property is separate and free of the husband's control (N. Y. Domestic-Relations Law, L. 1909, ch. 19, sect. 50).

p. 10 "* * * *if she had so surrendered the contracts immediately prior to the decedent's death, she would have received some $5,000 less than she actually received when her husband died".* This argument would cast every insurance policy, wholly and absolutely owned by a wife, into the husband's estate. The result is contrary. The increase in value after death is not at the expense of the husband's estate but flows from the provisions of the contract itself. We are returned to the bare question again of who owns the contract.

p. 11 "*None of the proceeds which the wife received came to her as a result etc.*" They came to her by the very terms of the contracts. This criticism cannot affect the crucial question of who wholly owned and absolutely controlled the contracts.

p. 13 *Tyler* v. *United States*, 281 U. S. 497 and *United States* v. *Jacobs*, 306 U. S. 363, do not apply. In the first case, the wife only came by her absolute estate upon the death of her husband with whom she held the property by the entirety. In the *Jacobs* case, they were joint tenants and therefore specifically subject to the provisions of subdivision (e) of the section. The question involved was merely whether that Section of the Revenue Act of 1924 which included property held jointly by the decedent and another in a decedent's gross estate was constitutional if construed retroactively to embrace joint tenancies existing before its enactment. True, in the *Jacobs* case, the wife might have by partition severed and disposed of her half of the joint property; but she could not, as here, have completely alienated the property so as to exclude her husband during his lifetime and the peculiar point of the statute was that, despite the joint tenancy,

e entire asset was rendered part of the gross estate the decedent if he had paid the full consideration for as Jacobs had (306 U. S. 365-6). The joint tenancy *isted* at his death. He *was* a joint tenant. Only his eath there brought her into complete ownership of the intly held property. Here it was hers as fully while e lived and the decedent had neither title nor right.

p. 14 *"The fact that the wife might have cut the string immaterial if she did not do so"*. The respondent's eory is that the decedent held the string but that the ife might have cut it—a superb example by piling metahor upon metaphor. The figure so often used in the ases of a string retained by the decedent implies no more nd no less, we believe, than that the decedent had some ontrol. To say that the wife may cut the string which e holds is to concede, we submit, that the string was in er hands and not in his.

Certainly, as we pointed out in our original brief (p. 7), if the wife, possessing the right to acquire the economic benefits or to dispose of them by assignment, had lied, the value of these two contracts would have formed art of her gross estate. Are they at the same time included in the decedent's gross estate and in the wife's? And if they are, upon the simultaneous death of both of hem, are the proceeds taxable fully to both estates? There can be no division between the estates, it is assumed, since there is no joint tenancy. Since, then, the roperty would be apportioned to the wife's gross estate, t seems a reduction to the absurd to include them in that f the husband who had no control and might at her ree will have been "excluded."

The conclusion would seem to be that all the husband njoyed was an insubstantial hope, falling far short of the ignity of property or of any possibility of reverter.

p. 16 *"* * * the decedent actually received an annual eturn of 2.9% on his investment in the form of an annuity so long as he lived."*

p. 17 "* * * *The decedent actually received the income, etc.*".

This again begs the question. The test of the statute is not what the decedent received as an act of grace, but whether "he has *retained* for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death * * * the *right* to the income from the property". Here he retained nothing and had no rights. Every cent of his income from the so-called annuity contract might have been cut off at will by the wife. The insurance contract, which is separable in all respects, provided no income at all to him. The very quotation from the Senate Finance Committee Report at the top of the respondent's page 18 refers this clause to a situation where the decedent *reserves* the income for an extended term of years during which time he dies. The test is, therefore, not whether the decedent received an income by the indulgence of a third party, but whether he retained an indefeasible *right* to the income which could not be destroyed at another's whim.

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